

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 13 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2011-0204-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
ILEANA KRYSTAL LINN,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093571001

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

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The Hopkins Law Office, P.C.  
By Cedric Martin Hopkins

Tucson  
Attorneys for Petitioner

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E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Ileana Linn seeks review of the trial court’s order dismissing summarily her petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. Although we grant her petition, we deny the relief she has requested for the reasons stated below.

¶2 Linn was charged with two counts of third-degree burglary, one count of aggravated taking the identity of another, two counts of forgery, and five counts of theft of a credit card. The state alleged, pursuant to A.R.S. § 13-708,<sup>1</sup> that at the time of the offenses Linn was on probation, community supervision, or another form of release in Pima County Superior Court Cause Nos. CR-20084417 and CR-20083809. The state also alleged that she had two historical prior felony convictions, one of which was for forgery in CR-20084417, and the other of which was for aggravated assault in Maricopa County Superior Court Cause No. CR2007-008413. Pursuant to a plea agreement, Linn was convicted of aggravated identity theft and admitted she had committed the offense while she was on probation. The trial court sentenced Linn to the presumptive prison term of 3.5 years, to be served consecutively to terms imposed in the two causes for which she had been serving the probationary terms.

¶3 Linn sought post-conviction relief pursuant to Rule 32, claiming the conviction had been obtained in violation of her Fifth, Sixth, and Fourteenth Amendment rights because before entering the plea, she had never been informed the sentence in this cause “had to be served consecutive[ly] to” sentences imposed in CR-20084417 and CR-

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<sup>1</sup>We refer to the version of the statute in effect when Linn committed her offenses, in August 2009. *See* 2009 Ariz. Sess. Laws, ch. 82, § 5.

20083809. Supporting her arguments with her own affidavit, she contended the trial court had failed to comply with the requirements of Rule 17.2, Ariz. R. Crim. P., by neglecting to inform her of the consequences of admitting she was on probation, insisting that, had she known the prison term had to be consecutive, she would not have entered the plea. Linn contended that at the very least, she had raised a colorable claim entitling her to an evidentiary hearing.

¶4 The state and the trial court addressed Linn's petition as if she had only raised a claim of ineffective assistance of trial counsel, rather than a challenge to the constitutionality of the plea in light of the trial court's failure to comply with Rule 17.2. The state relied to a large degree on the affidavit of trial counsel, which the state attached to its response. Trial counsel avowed she had informed Linn about all special sentencing provisions, including the effect of § 13-708. That statute provides, *inter alia*, that a defendant who commits a felony while on probation for an earlier felony must be sentenced, at minimum, to the presumptive term of imprisonment. § 13-708(C). It states further that the "sentence imposed pursuant to" the statute "shall revoke" the release in the prior cause and "shall be consecutive to any other sentence from which the convicted person had been temporarily released." *Id.*

¶5 The trial court denied relief without an evidentiary hearing, finding Linn had failed to raise a colorable claim. The court found the special sentencing provision had been referred to in the plea agreement and pursuant to § 13-708 Linn had admitted in the signed plea agreement that she had committed the offense while on probation. The court noted that Linn had represented to the court at the change-of-plea hearing that she

had reviewed the agreement with counsel and had understood its terms. And, referring to trial counsel's affidavit, the court added, "[H]er counsel has attested that she informed [Linn] of the consequences of committing a crime while on release . . . ." As further evidence that Linn had understood the significance of admitting she was on probation at the time of the offense, the court relied on trial counsel's affidavit. Therein, trial counsel avowed that, after the change-of-plea hearing, Linn had specifically sought removal of the consecutive sentencing provision, a request the prosecutor had rejected in light of the other benefits provided by the plea.

¶6 On review, Linn asserts, as she did in her petition for post-conviction relief, the trial court failed to comply with Rule 17.2 by neglecting to inform her of the sentencing implications of her admission that she had been on probation when she committed the offense; she asserts she was never told by anyone she was facing a mandatory consecutive prison term. Linn contends that "[w]ithout holding a hearing, the trial court found that [Linn]'s counsel explained that her prison sentences would have to be served consecutive to one another." She denies counsel explained this to her and referring to the change-of-plea proceeding, she adds, "it is incumbent upon the trial judge to ensure that a record is made with respect to [Linn] understanding that her prison sentences had to be served consecutive[ly] to one another." Linn asserts that because she was not aware of this special sentencing provision, "this Court should vacate the judgment of guilt and sentence."

¶7 The record demonstrates that Linn is correct that the trial court did not expressly inform her at the change-of-plea hearing that, by admitting she was on

probation when she committed the offense, she would necessarily be sentenced to a consecutive prison term. Thus, the court did not fully comply with Rule 17.2. Nor did the plea agreement expressly inform Linn a consecutive prison term was required by § 13-708. Rather, it provided that there was “no agreement as to whether the sentence imposed in this cause number shall run consecutively or concurrently to any other sentence[] imposed, unless the applicable statutes expressly require consecutive sentences or unless otherwise stated in the special terms.” And although the section entitled “Special Terms” cites § 13-708, it does not specify the significance of that statute’s application and explain that it mandated the imposition of a consecutive prison term.

¶8 As Linn concedes in her petition for review, however, the mere fact that a trial court has failed to inform a defendant about a special sentencing provision does not necessarily require that the plea be vacated. Rather, our supreme court has held that “[v]iolations of [Rule 17] do not necessarily require the plea to be vacated.” *State v. Ellis*, 117 Ariz. 329, 333, 572 P.2d 791, 795 (1977). Instead, a reviewing court “should examine the sentence actually imposed,” and if it “contains any provision that the defendant was not aware of, that affects the manner in which the sentence . . . is computed, either the guilty plea should be vacated or the case remanded to determine if the defendant was actually aware of the provision absent from the record.” *Id.* The court concluded that ““if the defendant was not prejudiced by his lack of understanding of the complete provisions of the sentencing statute, the error is not reversible error.”” *Id.*, quoting *State v. Cuthbertson*, 117 Ariz. 62, 64, 570 P.2d 1075, 1077 (1977).

¶9 Whether Linn was prejudiced by the trial court’s failure to fully comply with Rule 17.2 was a factual question raised by Linn’s petition, the state’s response, and the affidavits supporting each of them. Thus, notwithstanding the trial court’s erroneous characterization of Linn’s claim as one of ineffective assistance of counsel, the court correctly focused on the issue that was at the heart of Linn’s claim: Was Linn prejudiced by the court’s failure to explain the ramifications of her admission to having been on release at the time of the offense, or was she otherwise aware of those ramifications when she entered into the plea agreement? The trial court appears to have resolved this question of fact by relying primarily on trial counsel’s affidavit, rejecting as not credible Linn’s affidavit to the extent it expressly or implicitly conflicted with counsel’s affidavit.

¶10 Generally, when the defendant has raised a material issue of fact and a colorable claim for relief, the defendant is entitled to an evidentiary hearing. *See* Ariz. R. Crim. P. 32.6(c) (court may issue summary disposition of petition in absence of material issue of fact); Ariz. R. Crim. P. 32.8(a) (defendant entitled to evidentiary hearing “to determine issues of material fact”); *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990) (defendant entitled to evidentiary hearing if defendant raises colorable claim for relief in petition). “A colorable claim of post-conviction relief is ‘one that, if the allegations are true, might have changed the outcome.’” *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). Thus, the petitioner’s allegations must be taken as true to determine whether the claim is colorable. *See State v. Lemieux*, 137 Ariz. 143, 147, 669 P.2d 121, 125 (App. 1983) (petitioner entitled to evidentiary hearing if allegations in

petition, when taken as true, would affect outcome of case). An evidentiary hearing should be conducted “to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review.” *State v. D’Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988), quoting *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶11 Although the trial court should have held an evidentiary hearing to resolve the factual dispute here, we nevertheless deny Linn the relief she is requesting on review. In her petition for review, Linn seeks only an order from this court “vacat[ing] the judgment of guilt and sentence.” She does not argue she is entitled to a remand for an evidentiary hearing; she neither asserts she had raised a colorable claim nor does she cite and discuss authority for that proposition. And, until she has established that she was prejudiced by the trial court’s failure to comply with Rule 17.2, she is not entitled to have her judgment vacated. *See Ellis*, 117 Ariz. at 333, 572 P.2d at 795. The issue of whether she was entitled to an evidentiary hearing therefore is waived.

¶12 Turning to the only question raised by the petition for review, given the record that was before the trial court, it did not abuse its discretion in declining to vacate Linn’s conviction and sentence. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007) (appellate court will not disturb trial court’s summary dismissal of petition for post-conviction relief absent abuse of discretion). That record not only includes Linn’s and trial counsel’s conflicting affidavits, but the presentence report, which states, under a section entitled “Penalty” and a subsection entitled “Mandatory,” that the “[s]entence shall be consecutive [to] any other sentence from which the convicted

person had been released.” In addition, the transcript from the February 8, 2010 sentencing hearing establishes that in Linn’s presence, the court commented and trial counsel confirmed that a consecutive prison term was mandatory; the court explained this was why it was “not inclined” to sentence Linn to an aggravated prison term. Linn raised no objection to that observation nor suggested that it conflicted with her understanding of the plea agreement.

¶13 Because Linn has neither asked this court to remand the case for an evidentiary hearing nor suggested that the trial court erred in failing to provide her one, and because the record before us otherwise supports the trial court’s ruling, we grant the petition for review but deny relief.

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Judge